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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of	)	
	)	
Pacific Bell, Nevada Bell,	)	
Pacific Bell Mobile Services	)	Gen. Doc. No. 90-314
and Pacific Telesis Mobile Services'	)	
Plan of Non-Structural Safeguards	)	
Against Cross-Subsidy and	)	
Discrimination	)	

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COMMENTS

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SUMMARY

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits its comments on the plan of non-structural safeguards (the "Plan") filed by Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services (collectively "PacTel"), which PacTel proposes to implement for joint operation of Personal Communications Services ("PCS") and telephone service. PacTel's Plan is insubstantial and ineffective. If it is granted without requiring strengthened protections against anticompetitive conduct by LECs, PacTel will have the tools to emasculate the successful deployment and rapid expansion of PCS infrastructure and competition in local exchange markets.

While the Commission has emphasized that the integrated operation of in-region LEC landline telephony and PCS services requires regulatory safeguards to protect the telephony ratebase and non-LEC affiliated PCS competitors from unreasonably discriminatory and anticompetitive practices, such as cross-subsidization, the PacTel Plan fails to fashion any effective safeguards. PacTel's proposal fails to address the significant threat to competition that integration of LEC landline monopoly facilities and advanced PCS spectrum poses.

The Plan falls far short of the minimum criteria Cox has identified: (i) application and compliance with expanded cost allocation and affiliate transaction rules; (ii) disclosure of the scope of PacTel's PCS affiliate's activities and the activities of related PacTel affiliates or subsidiaries involved in PCS construction, operation and management; and (iii) establishment of reasonable interconnection arrangements that advance the public interest.

This is hardly surprising given PacTel's intended use of PCS as an ancillary service to local monopoly services and as a strategic defense against PCS as a local loop competition.

Non-structural safeguards alone will not enable the Commission, state utility commissions, telephone ratepayers or competitors to determine whether PacTel is properly identifying or allocating costs between PCS and its monopoly landline business. Part 64 cost allocation rules are designed to separate the costs of regulated telephony service (defined as services regulated as common carriers under Title II) from the costs of non-regulated activities of LECs. Because these costing systems provide only abridged accounting for regulated and non-regulated accounts and there is no mechanism or Commission policy to determine what constitutes a PCS cost as opposed to a telephone cost, current Part 32 and 64 accounting systems cannot begin to prevent anticompetitive cost-shifting by PacTel of its PCS costs to its "regulated" telephony ratebase.

The benefits of "economies of scope" that PacTel contends will result from integration of its landline telephony operations and PCS are illusory. The asserted "economies" of integration beg the central question of what costs are properly allocated to PCS and what costs are properly allocated to landline telephony. Furthermore, non-structural safeguards have proven to be ineffective in the past to prevent LECs from cross-subsidizing services offered in competitive markets through captive telephone ratepayers.

PacTel has not demonstrated how it complies with either Comparably Efficient Interconnection ("CEI") or Open Network Architecture ("ONA") requirements even though the Commission decided to make LEC compliance with CEI and ONA a necessary precondition to lifting of structural separation. Nor do the costs to PacTel of imposing stricter separation and reporting requirements regarding its integrated PCS and landline telephone operations outweigh the benefits to wireless competitors of meaningful protections against LEC monopoly power.

In light of the important role, as affirmed by the Commission, that interconnection will play in the evolution of a wireless "network of networks," PacTel's Plan plainly flouts the Commission's interconnection vision. The Plan's interconnection provisions violate existing Commission rules by affording PacTel's PCS affiliate unreasonably discriminatory collocation arrangements and by refusing Cox and other PCS providers mutually compensatory terms for interconnection. Furthermore, by attempting to foist a currently unapproved State "Wireless Carrier" tariff unilaterally upon PCS licensees, PacTel violates the Commission's requirement that LECs negotiate interconnection agreements with CMRS providers in good faith.

PacTel's attempt to "whipsaw" between State and Federal jurisdictions to game the regulatory system also belies the asserted fairness of the Plan. Rather than allowing PacTel to evade interconnection requirements by assertion of jurisdictional technicalities and plain recalcitrance, the Commission should assert itself to require that PacTel's LEC-to-PCS interconnection reflect existing Federal interconnection principles, including mutual compensation. Finally, the Commission must consider the broader impact of PacTel's interconnection arrangements upon the public interest, given the special types of collocation arrangements that PacTel will offer only to its PCS affiliate and the fact that PacTel's proposed term discounts would violate expanded interconnection principles.

In short, PacTel's proposed "safeguards" Plan will ensure nothing except PacTel's ability to preserve and extend its landline monopoly into California PCS markets to the detriment of PCS competitors. To prevent such an anticompetitive result, the Commission must engage in reasoned analysis and impose heightened separations rules and stricter and ongoing reporting requirements to facilitate public scrutiny of PacTel's cost allocation methods. Fundamentally, the Commission will fail to achieve its PCS vision if it ignores the interconnection rights of non-affiliated PCS licensees that the PacTel Plan shamelessly seeks to nullify.

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COMMENTS

Cox Enterprises, Inc. ("Cox"), by its attorneys, hereby submits its comments on the plan of non-structural safeguards (the "Plan") filed by Pacific Bell, Nevada Bell, Pacific Bell Mobile Services and Pacific Telesis Mobile Services (collectively "PacTel") that describes the non-structural safeguards PacTel proposes to implement to comply with Commission requirements governing the joint operation of Personal Communications Services ("PCS") licenses and telephone operations.[1/]

I. INTRODUCTION

The Commission has expended years of effort in the rulemaking process to speed the introduction of broad-based, mass marketed personal mobility services, intending for

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1/ See Amendment of the Commission's Rules to Establish New Personal Communications Services, Second Report and Order, 8 FCC Rcd 7700, 7748, n.96 (1993) ("Broadband PCS Order").

these services to compete with both cellular and landline telephony. In Cox's view, PCS' main public policy benefit and legacy rests entirely on its ability to provide a viable alternative to incumbent LEC monopoly networks.[2] Cox has urged the Commission throughout its processes to champion PCS as a real alternative to LEC monopolies, and the Commission has embraced PCS' competitive potential.[3] Without imposition of additional safeguards, however, fully developed competition will not be possible in the markets where PacTel, holder of PCS licenses for the Los Angeles-San Diego and San Francisco-Oakland-San Jose MTAs, is permitted to integrate its landline telephony monopoly power and PCS operations.[4]

The Commission has recognized expressly that effective regulatory safeguards are essential pro-competitive protections if a LEC operates PCS systems jointly with its

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2/ Cox sought and was awarded one of three pioneer preferences for development of PCS, and a Cox subsidiary holds the A Block license for the Los Angeles-San Diego MTA. A critical element of Cox's vision for PCS has been its ability to challenge the LEC landline local loop monopoly. Cox also won the Block B license for the Omaha, Nebraska MTA in the recent auction and another of Cox's subsidiaries is a partner in WirelessCo, L.P. and PhillieCo, L.P., the licensees of 30 broadband PCS licenses in MTAs including New York, San Francisco-Oakland-San Jose, Detroit, and Dallas-Ft. Worth.

3/ "The advent of PCS is expected to have a great impact on the future development and configuration of all telecommunications networks by improving significantly their flexibility and functionality. Many PCS applications have the potential to create new markets and to provide competition in others for the first time. PCS also will raise the overall level of competition in many already competitive segments of the telecommunications industry." Broadband PCS Order, 8 FCC Rcd at 7702.

4/ Pacific Bell, Nevada Bell and Pacific Telesis Mobile Services are all direct subsidiaries of Pacific Telesis Group. Pacific Telesis Mobile Services ("PTMS") is the actual PCS licensee, and Pacific Bell Mobile Services ("PBMS"), a direct subsidiary of Pacific Bell, will design, construct, manage, operate and market PCS for PTMS. These PCS subsidiaries are not, however, structurally separate for accounting and regulatory purposes.

landline service holdings.[5] These all-important safeguards, however, are presently unspecified. PacTel's Plan is a testament to the need for independent Commission analysis and establishment of safeguards that will in fact address the potential for anti-competitive mischief inherent in joint LEC/PCS operations.

For example, under its present Plan, PacTel can conduct joint marketing efforts for its landline and PCS services, can provide joint billing and collection for the two services, and can share network expenses, including personnel and equipment, between PCS and landline telephony. Nothing in PacTel's Plan prevents manipulation of the portion of these expenses allocated to PCS -- despite the fact that they are the essence of cross-subsidy. Indeed, nothing in PacTel's Plan provides the Commission, or California State regulators, any information to track or identify cross-subsidies.

The PacTel Plan also is woefully deficient in its failure to present any concrete proposals for effective financial safeguards or mechanisms to achieve reasonable interconnection. Leaving aside the wisdom of permitting the self-interested LEC to draft the safeguards that will apply to its integrated operations, the Plan falls far short of the minimum criteria Cox has previously identified: 1) application and compliance with expanded cost allocation and affiliate transaction rules; 2) disclosure of the scope of PacTel's PCS affiliate's activities and the activities of related PacTel affiliates or subsidiaries involved in PCS

5/ See Implementation of Sections 3(n) and 332 of the Communications Act, Second Report and Order, 9 FCC Rcd 1411 (1994) ("Second CMRS Report and Order"); Broadband PCS Order at 1491-1493.

construction, operation and management; and 3) establishment of reasonable interconnection arrangements that advance the public interest.[6]

Because PacTel has spun off its cellular operations and acquired 30 MHz MTA licenses that cover its landline region, the adoption of effective safeguards takes on an even more critical aspect. When the decision to permit PCS/LEC integration was made, the Commission assumed LECs would seek 10 MHz BTA licenses to provide ancillary local loop services. The Commission could not have envisioned that PacTel would spin-off its cellular operations and bid top dollar to acquire one of only two 30 MHz MTA licenses available within its monopoly landline region.

PacTel already has spent hundreds of millions of dollars to acquire licenses and develop PCS in its landline territory. Not unlike PacTel's investments in upgrading its network for video dialtone, PacTel's network investments for PCS will require that the Commission make critical decisions on the allocation of common costs to PacTel's PCS venture. The Plan is completely silent on this essential issue.

6/ See Petition of Cox Enterprises, Inc. to Deny or to Condition License Grant, File No. 00002-CW-L-95, Call Sign KNLF205 (filed May 12, 1995). As the Commission previously recognized and Congress recently confirmed, structural separation is more effective than non-structural safeguards in detecting and deterring anti-competitive LEC behavior. The Commission determined in the PCS rulemaking that non-structural separation would be sufficient and believed that such policies and rules could be effective. Based on its experience thus far, Cox does not share the Commission's confidence in non-structural safeguards and urges reassessment of this determination as part of the required analysis of appropriate safeguards.

PacTel's offer to apply Computer III-type[7] non-structural "safeguards" does not begin to address the scope of the Commission's concerns and proposes little of real substance to mitigate the acknowledged anti-competitive incentive and ability of PacTel to hinder its PCS competitors that seek to compete against PacTel's core monopoly business. PacTel has not identified specific Comparably Efficient Interconnection ("CEI") or Open Network Architecture ("ONA") safeguards, developed as a quid pro quo for structural relief in LEC provision of enhanced services, nor demonstrated that its Plan represents appropriate or effective means of addressing the competitive concerns surrounding integrated provision of PCS. These competitive concerns differ substantially, and are far broader, than the concerns that prompted Computer III-type safeguards for enhanced services.

With enhanced services, the Commission's concerns were to ensure that the LECs did not discriminate against non-LEC affiliated enhanced services providers and that the LECs did not design their monopoly networks to favor their enhanced services subsidiaries. In contrast, PCS can compete directly against the LEC landline monopoly. As such, the enhanced services non-structural rules simply do not address whether the LEC is designing its network and PCS operations in a manner that may be facially non-discriminatory, but inhibits competition to the core monopoly. For example, PacTel apparently intends to provide PCS as

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7/ See Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Thereof; Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 104 F.C.C.2d 958 (1986) ("Computer III Phase I Order"). See also In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, Notice of Proposed Rulemaking, CC Docket No. 95-20, FCC 95-48 (adopted February 7, 1995, released February 21, 1995) ("Computer III Further Remand Notice").

an ancillary service to its landline core business. This decision will affect its choice of PCS network structure, and could potentially hinder competition.

Consequently, the Commission must reformulate its approach to LEC in-region participation in PCS and engage in a reasoned policy analysis to establish competitive safeguards that are tailored for this unique circumstance. Fundamentally, PacTel's Plan fails to address the task before the Commission. Rather than begin the analysis using PacTel's proposal, the Commission should engage in an independent analysis of the minimum safeguards required to ensure that in-region LEC PCS operations do not inhibit competition, not because the LECs are better competitors, but because the LECs can unfairly leverage monopoly resources. One critical aspect of this analysis must be to require PacTel to provide the Commission, and state regulators, with sufficient information on its PCS activities to ensure that PCS costs are not mis-allocated to captive telephone ratepayers.

Further, because PacTel is already deeply involved in deploying its PCS system, meaningful safeguards must be adopted quickly to prevent PacTel from improperly loading already incurred costs on captive telephone ratepayers and from stifling PCS competition, particularly the promise of wireless local loop competition, with unreasonable interconnection arrangements. Cox is concerned, for example, that the PacTel Plan does not appear to capture the developmental and deployment expenses incurred by PacTel thus far. Consequently, the safeguards, when adopted, must include provisions that require PacTel to disclose and account for all relevant PCS expenses, including those already incurred.

If the Commission acts in a timely fashion to establish meaningful safeguards for LEC in-region provision of PCS, PacTel's business plans need not be delayed. The

Commission must, however, reject PacTel's Plan, quickly establish the required safeguards, and require PacTel to refile a new plan that addresses the concerns laid out below.

II. MEANINGFUL REGULATORY SAFEGUARDS ARE ESSENTIAL IF A LEC PROVIDES PCS WITHIN ITS LANDLINE SERVICE AREA

A. The Commission Has Recognized That LEC In-Region Ownership of PCS Systems Could Adversely Affect Competition and That Safeguards Against Anti-Competitive Conduct Are Essential

PCS was created by the Commission to establish a new telephony service that could compete with established landline and cellular telephony providers.[8/] To ensure that no single segment of the established telecommunications industry would dominate or entirely subordinate PCS' competitive potential, the Commission established 40 MHz PCS spectrum and 45 MHz cellular-PCS spectrum caps.[9/] Subject to the spectrum caps, LECs were permitted to acquire PCS licenses in their local service areas because the Commission was persuaded by LEC arguments that, if LECs could provide PCS service, they would develop their wireline architectures to better accommodate all PCS providers.[10/] Cox opposed allowing LECs to hold PCS licenses in their monopoly landline service areas because of their

8/ See, e.g., Comments of Dr. W. Russell Neuman, Massachusetts Institute of Technology, Before the Federal Communications Commission En Banc Hearings on Personal Communications Services, December 5, 1991, "Personal Communications Services: The Hidden Harvest" (advocating that the Commission recognize the potential of PCS to compete with the local loop).

9/ See 47 C.F.R. §§ 24.204, 24.229(c).

10/ Broadband PCS Order, 8 FCC Rcd at 7751 existing wireless and wireline market power and their obvious incentive to block development of competitive PCS services.[11/]

While the Commission chose to rely on LEC assurances that non-structural safeguards would adequately address competitive concerns, it acknowledged that "if LECs are permitted to supply PCS within their service territories, they may have incentives to discriminate against competitors requesting interconnection as well as to cross-subsidize PCS provision from expenditures ostensibly made to serve rate-regulated wireline customers."[12/] Subsequently, the Commission continued to "recognize the concerns expressed about LEC [in-region] participation in PCS."[13/] However, it determined that LECs should be permitted to participate in PCS in-region, and rejected imposing a fully separate subsidiary requirement.

Without specifying any particular non-structural safeguards, the Commission determined that "commencement of service by LECs . would be contingent on the LEC implementing an acceptable plan for nonstructural safeguards against discrimination and cross-subsidization."[14/] In a related proceeding, the Commission determined that PCS is

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11/ See Comments of Cox Enterprises, Inc. filed in GEN Docket No. 90-314, ET Docket No. 92-100 at 16-22 (filed November 9, 1992) ("LECs have a clear vested interest in maintaining control of a monopoly local exchange. Granting LECs access to PCS spectrum takes available spectrum away from other potential PCS providers who will compete with the LEC local exchange. A LEC assignment of scarce PCS spectrum will do nothing to advance competition.").

12/ Amendment of the Commission's Rules to Establish New Personal Communications Services, Notice of Proposed Rule Making and Tentative Decision, 7 FCC Rcd 5676, 5705 (1992).

13/ Broadband PCS Order, 8 FCC Rcd at 7751

14/ Broadband PCS Order, 8 FCC Rcd at 7748 n.96.

presumptively a common carrier Commercial Mobile Radio Service to be afforded Title II forbearance.[15/] The Commission also reiterated its decision to require LEC-affiliated in-region PCS service providers to comply with safeguards "to ensure that the dominant landline carrier does not act anti-competitively or harm ratepayers of regulated services."[16/]

When it established the broadband PCS rules, the Commission expected the LECs to bid only on in-region 10 MHz licenses. Consequently, the Commission has never addressed the regulatory implications of a LEC offering in-region 30 MHz broadband PCS service on a fully integrated basis throughout its regulated landline monopoly region. In the Broadband PCS Order the Commission determined that unspecified non-structural safeguards would suffice. In the Second CMRS Report and Order the Commission implied that LEC-affiliated CMRS providers would be subject to the Part 32 and Part 64 accounting safeguards of the Commission's rules.[17/] Accounting safeguards were deemed "necessary because they help to ensure that costs of . . affiliates are not passed to and included as costs of the local exchange carrier."[18/] The Commission, however, did not specify how these rules should apply to LEC provision of PCS, given that Part 64 rules only apply to non-regulated LEC services.[19/]

15/ Second CMRS Report and Order, 9 FCC Rcd at 1461.

16/ Second CMRS Report and Order, 9 FCC Rcd at 1491.

17/ Second CMRS Report and Order, 9 FCC Rcd at 1492 n.443.

18/ Id.

19/ Indeed, as discussed below, this portion of the Second CMRS Report and Order is sufficiently ambiguous that PacTel filed a Petition for Clarification or Reconsideration on the issue of whether the accounting rules in Parts 32 and 64 apply to PCS. See Petition for Clarification or Reconsideration of Pacific Bell filed in GEN Docket No. 93-252 (filed May 19, 1994).

In response to commenters who argued that separate subsidiaries for LEC provision of PCS and other CMRS are essential to minimize opportunities for cross-subsidization and anti-competitive behavior,[20] the Commission acknowledged that:

> the issues raised by commenters regarding accounting, structural separation, and other safeguards address important questions with regard to steps that should be taken to promote a competitive commercial mobile radio services environment in which the various market participants, including both established service providers and new entrants, and including both large and small carriers, have a fair opportunity to compete for new customers and in the development of new services. We believe that the Commission can play a positive role in fostering this competitive environment by examining and establishing the proper mix of safeguards designed to ensure that no CMRS provider gains an unfair competitive advantage resulting from its size or its preexisting position in particular CMRS markets. . . . Although we defer this issue to a separate proceeding, we draw attention here to the fact that we recognize the importance of the decisions we must make in examining these issues.[21]

The Commission also recognized the critical importance of readily available, reasonable LEC interconnection to the development of PCS, observing that "interconnection with the public switched network will be an essential component in the successful establishment and growth of CMRS offerings."[22] As a result, LECs are required to provide the "type of interconnection reasonably requested by all CMRS providers" under a system of mutual compensation, reasonable charges, and equal access.[23] The Commission also

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20/ See, e.g., Comments of Cox Enterprises, Inc. filed in GN Docket No. 93-252 at 6-7 (filed November 8, 1993).

21/ Second CMRS Report and Order, 9 FCC Rcd at 1493 (emphasis added).

22/ Second CMRS Report and Order, 9 FCC Rcd at 1499.

23/ Second CMRS Report and Order, 9 FCC Rcd at 1498.

preempted state and local regulations on the kind of physical interconnection arrangement to which CMRS providers are entitled.[24]

While the Second CMRS Report and Order requires LECs to provide "reasonable and fair" interconnection to PCS providers, the meaning of "reasonable and fair" was unspecified. However, citing the comments of Cox and others, the Commission stated that:

> the comments have convinced us that our current system of individually negotiated contracts between LECs and Part 22 providers warrants review and possible revision. . . . From a competitive perspective, the LECs' provision of interconnection to CMRS licensees at reasonable rates, and on reasonable terms and conditions, will ensure that LEC commercial mobile radio service affiliates do not receive any unfair competitive advantage over other providers in the CMRS marketplace. Therefore, we intend to issue a Notice of Proposed Rule Making requesting comment on whether we should require LECs to tariff all interconnection rates.[25]

Shortly thereafter the Commission issued a Notice of Proposed Rule Making to govern requirements for interconnection service provided by LECs to CMRS providers.[26]

24/ Id. In the underlying rulemaking, Cox commented that the Commission should also order the LECs to file with the Commission information such as intrastate interconnection tariffs, and all contracts with their PCS affiliates for interconnection and billing and collection services, to ensure that the full scope of applicable charges and service conditions could be ascertained and so that unreasonable discrimination could be evaluated. See Comments of Cox Enterprises, Inc. filed in GN Docket No. 93-252 at 5-6 (November 8, 1993). PacTel opposed filing interconnection tariffs with the Commission, arguing not that the information was irrelevant, unavailable or particularly burdensome, but curiously that the decision whether to tariff PCS interconnection rates should be left to the states. See Comments of Pacific Bell and Nevada Bell, GN Docket No. 93-252 at 20 (November 8, 1993).

25/ Second CMRS Report and Order, 9 FCC Rcd at 1499.

26/ In the Matter of Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, Notice of Proposed Rule Making and Notice of Inquiry, 9 FCC Rcd 5408 (1994) ("Interconnection Notice")

The Commission noted that "LECs have some incentive to delay or to impose barriers to the development of competition from new CMRS services, such as PCS,"[27] and asked for comment on a range of different interconnection alternatives.[28] The Commission has not adopted any specific interconnection proposals in connection with its pending Interconnection Notice.

B. PacTel's Strategy of Deferring a Commission Decision on Critical Competitive Issues Has Succeeded in Allowing PacTel to Determine the Policies for PCS Integration

PacTel has actively participated in the Commission's PCS dockets and has expended enormous effort (and large sums of money) to ensure its participation in PCS throughout California. It is obvious and well recognized that PacTel placed itself in a strategic position that uniquely and publicly established the 30 MHz Los Angeles-San Diego Block B license and a 30 MHz San Francisco-Oakland-San Jose license as vital to its business plans and indispensable to its monopoly-leveraged participation in the wireless marketplace.[29]

27/ Interconnection Notice, 9 FCC Rcd at 5456.

28/ Cox again urged the Commission to "take a more active role in ensuring that LECs do not use their bottleneck control over local exchange facilities to hinder the development of local competition." Comments of Cox Enterprises, Inc., filed in CC Docket No. 94-54 at 4 (filed September 12, 1994). Along with others, Cox also advocated Commission establishment of "bill and keep" interconnection arrangements as a reasonable and fair approach to interconnection of competing PCS and LEC networks.

29/ See "Wireless Warrior PacTel Finds It Pays to Advertise," San Francisco Business Times, October 14, 1994, quoting Michael Killen, Telecommunications Analyst ("If PacTel fails to win the [PCS] license, it could lose about 20% of its market to wireless providers . . . . Pacific Telesis' whole strategy for the future can be blown away if they fail to get Los Angeles. . . Pacific Telesis positioned itself like no other company. . . .").

PacTel argued that the existence of its ubiquitous local landline infrastructure and its inherent ability to serve a mass market would promote competition in PCS and spur the development of PCS to the public.[30] As a "wholesale" provider of PCS, PacTel said it would serve any and all retail PCS providers by providing interconnection to its landline network, as well as by offering billing, transport and Intelligent Network services to the extent PacTel ultimately deemed these services technically and economically feasible.[31] As a "retail" provider of PCS, PacTel said it would build upon its Intelligent Network to provide PCS service using its integrated landline network and network functions.[32]

Recognizing that its proposed participation in PCS as a supplier of essential interconnection facilities and functions and as a PCS competitor would place it in an obvious position to injure the competitive development of PCS, PacTel assured the Commission that "[a]ppropriate safeguards will be in place so that ratepayers are protected and there is no possibility of cross-subsidy" or discrimination.[33] In particular, PacTel claimed that the

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30/ See Comments of Pacific Telesis Group filed in GEN Docket No. 90-314 and ET Docket No. 92-100 at 10-11 (filed November 9, 1992) ("Because the LECs can be capable providers of PCS, their participation would enhance competition."); Id. at 11 ("[B]y building on their existing infrastructures, LECs will broadly deploy PCS, while we expect that others will be slower to serve the mass market.").

31/ See Id. at 6.

32/ Id.

33/ Id. at 6-8.

Commission's cost accounting rules would adequately police the potential for cross-subsidization by mandating the allocation of costs between services.[34/]

Once it was clear that LECs without cellular interests would be permitted to acquire 30 MHz MTA PCS spectrum within their landline service areas, PacTel proceeded to divest its cellular holdings to acquire ubiquitous PCS spectrum.[35/] PacTel's cellular spin-off was complete within a little over a year from the release of the Commission's Broadband PCS Order.[36/]

PacTel made no secret of its willingness to bid whatever was necessary to win PCS licenses in areas overlapping its landline monopoly.[37/] PacTel bid aggressively, even overbidding itself on occasion, and was the high bidder on both the Block B license for the

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34/ According to PacTel, these non-structural safeguards, including the cost accounting rules, introduced into the regulation of PCS "some element of supervision and potential sanction" such that "a prudent business organization is not likely to flout the law." See Reply Comments of Pacific Telesis Group filed in GEN Docket No. 90-314 at 19 (filed January 8, 1993).

35/ Indeed, PacTel explicitly stated that the spin off was intended to permit PacTel and its subsidiaries to "pursue future opportunities in wireless communications." See, e.g., PacTel pro forma Applications for Transfer. See "Pacific Telesis Tells PUC Spinoff Will Not Affect Pacific Bell," Telecommunications Reports, June 28, 1993 at 3-4; "Pacific Telesis Must Give Ratepayers $41.3 Million Under California's Conditional OK of Spinoff," Telecommunications Reports, November 8, 1993 at 3-5.

36/ See Telecommunications Week, February 14, 1994 at 2 (indicating PacTel's intent to complete spinoff by second quarter of 1994); "AirTouch Completes Spinoff from Pacific Telesis," Telecommunications Reports, April 11, 1994 at 25.

37/ See "Canny Strategies Emerge in PCS License Bidding," Reuters, October 28, 1995 ("[T]he Los Angeles license is a must" for PacTel . . . . "It is expected to be willing to pay the biggest price of any for a Los Angeles license, perhaps as much as one billion.").

Los Angeles-San Diego MTA and the Block B license for the San Francisco-Oakland-San Jose MTA.

At this stage PacTel engaged in one of the most disingenuous moves throughout the entire PCS process. With its cellular spin-off complete and in a manner entirely contrary to its prior assurances to the Commission that application of the Part 32 and 64 accounting rules would prevent cross-subsidization, PacTel sought clarification of PCS' regulatory status in a Petition that asked the Commission to confirm that its cost accounting rules do not apply to LEC provision of PCS.[38/] With the matter of PacTel's cost accounting Petition and appropriate non-structural safeguards thus unresolved, Cox requested that the Commission condition grant of PacTel's Los Angeles PCS license on the resolution of these critical issues.[39/]

PacTel's reply to Cox's Petition emphasized the uncertain state of PCS safeguards. With its disingenuous promise exposed, PacTel suddenly changed its position on the need for rule clarification and claimed that there was no question that the Commission intended for the accounting rules in Part 64 to apply to LEC PCS affiliates. On the other issues Cox raised, PacTel implied that because the Commission had not developed specific

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38/ See Petition for Clarification or Reconsideration of Pacific Bell filed in GEN Docket No. 93-252 (filed May 19, 1994).

39/ Petition of Cox Enterprises, Inc. to Deny or to Condition License Grant, File No. 00002-CW-L-95, Call Sign KNLF205 (filed May 12, 1995) ("Petition"); Reply to Opposition to Petition to Deny or Condition License Grant, File No. 00002-CW-L-95, Call Sign KNLF205 (filed June 7, 1995) ("Reply").

rules on issues such as LEC interconnection, PacTel was free to do as it pleased.[40] Indeed, PacTel expressed an intention to ignore the policies the Commission has established for PCS competition, saying, for example, that it intends to offer interconnection to PCS competitors pursuant to a California intrastate tariff designed principally for cellular carriers.[41]

The Wireless Telecommunications Bureau, acting pursuant to delegated authority, granted PacTel's Los Angeles PCS license unconditionally on June 23, 1995.[42] The Bureau's Order incorporated Cox's Petition and Reply into the Second CMRS Report and Order docket as ex parte filings.[43] The Bureau did not impose any competitive safeguards on PacTel, and refused to decide whether the accounting rules in Parts 32 and 64 in fact apply to PacTel's provision of PCS.

As a result, PacTel now occupies an entirely unique position as the holder of 30 MHz PCS licenses and is able to build and operate jointly with its telephone operations one of the largest wireless systems in the United States without any regulatory protections against abuse of competitors by the landline monopoly. PacTel has been handed the drafting

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40/ Opposition to Petitions to Deny, File No. 00002-CW-L-95, Call Sign KNLF205 (filed May 25, 1995) at 5-8 ("Opposition").

41/ Opposition at 7 n.11. In the Second CMRS Report and Order, the Commission determined that LECs are to negotiate interconnection agreements with CMRS providers, not force CMRS providers to pick an interconnection arrangement from a limited set of intrastate tariff arrangements. See Second CMRS Report and Order, 9 FCC Rcd at 1497.

42/ Application of Pacific Telesis Mobile Services for a License to Provide Broadband PCS Service on Block B in the Los Angeles - San Diego Major Trading Area (M002), Order, File No. 00002-CW-L-95, DA 95-1413 (released June 23, 1995) ("Licensing Order"); Application for Review pending, Cox Enterprises, Inc. Application For Review, File No. 00002-CW-L-95, Call Sign KNLF205 (filed July 24, 1995).

43/ Licensing Order at 7.

pen on a plan for competitive safeguards. The result speaks for itself. Critical issues of accounting, reasonable interconnection and the scope of relationships among PacTel PCS and monopoly entities remain unaddressed. There is nothing in PacTel's Plan to prevent PacTel from loading every conceivable fully distributed cost or company overhead on its PCS competitors for items such as interconnection, while at the same time claiming that "economics of scope" allow PacTel to provide its PCS affiliate access to advanced intelligent network and other network functions under far more favorable terms.[44/] PacTel has not proposed, nor has it been given any instruction on how to identify and allocate costs that are common to its landline and PCS operations. The only major obstacle standing between PacTel and complete freedom to conduct its PCS business as it chooses is Bureau approval of PacTel's non-structural safeguards Plan.[45/]

44/ These asserted "economies of scope" are nothing more than cross-subsidies.

45/ It is not at all clear that the Bureau has the requisite authority to rule on the adequacy of the Plan's safeguards given the novel question of Commission policy it presents. The Commission's rules regarding delegated authority provide that:

> The Chief, Wireless Telecommunications Bureau shall not have authority to act on any complaints, petitions or requests, whether or not accompanied by an application, when such complaints, petitions or requests present new or novel questions of law or policy which cannot be resolved under outstanding Commission precedents and guidelines.

See 47 C.F.R. § 0.331(a)(2) reprinted in Amendment of Part O of the Commission's Rules to Reflect a Reorganization Establishing the Wireless Telecommunications Bureau and to Make Changes In the Delegated Authority of Other Bureaus, Order, FCC 95-213, at Appendix p. 9 (released June 9, 1995).

C. PacTel Has Failed To Address How It Intends To Comply With Computer III Comparably Efficient Interconnection and Open Network Architecture Safeguards

As Cox has repeatedly told the Commission, Computer III non-structural safeguards are insufficient to prevent LEC cross-subsidization. Even if the Computer III non-structural safeguards were sufficient to prevent cross-subsidization by PacTel, however, PacTel has failed to address how it intends to comply with Computer III comparably efficient interconnection ("CEI") and Open Network Architecture ("ONA") rules. The Commission has viewed the CEI and ONA rules as integral to the ability of non-structural safeguards to prevent discriminatory practices by BOCs, and therefore the Commission must consider whether the Plan satisfies the purpose behind these rules.

Since Computer III, BOCs have been permitted to provide particular enhanced services[46/] on an integrated basis with basic services[47/] pursuant to approved service-specific CEI and ONA plans. The Commission's CEI rules require LEC CEI plans to meet several specified parameters, including: interface functionality; unbundling of basic services; resale; technical characteristics; installation and maintenance reporting; end user access; availability as of the date the BOC offers enhanced services to public; minimization of transport costs; and availability to all interested affiliated and non-affiliated enhanced service providers

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46/ "Enhanced services" mean those services that "use the existing telephone network to deliver services other than basic transmission, such as voice mail, E-mail, voice store-and-forward, fax store-and-forward, data processing and gateways to on-line databases." See Computer III at ¶ 3.

47/ "Basic services" mean services "such as 'plain old telephone service' (POTS") [that] are regulated as tariffed services under Title II of the Communications Act." See id.